

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH STARLING, individually and on
behalf of his minor children M.J.S. and
M.E.S.,

Plaintiffs,

v.

WALMART INC, a Delaware Corporation,
Defendant.

Case No. C21-1156-RSM-MLP

ORDER RE: MOTIONS IN LIMINE

This matter comes before the Court on Defendant's Motions in Limine, Dkt. #31, and Plaintiffs' Motions in Limine, Dkt. #32. The Court finds oral argument unnecessary.

I. DEFENDANT'S MOTION IN LIMINE

A. Defendant's Opposed Motions in Limine

1. Litigation-Related Damages. Defendant moves to exclude any inference, argument, or testimony regarding emotional distress caused by this litigation under FRE 401–403. Dkt. #31 at 1. Plaintiffs argue that emotional distress suffered “during the entire time” is relevant and that they should be allowed to testify as to “the ongoing struggle with emotional distress regarding this incident” and note that Plaintiffs’ claim for outrage, which includes an element for intentional or reckless infliction of emotional distress,

1 survived Defendant's motion for summary judgment. Dkt. #37 at 1; *see* Dkt. #26 at 5–
2 10. Plaintiffs further argue that Defendants fail to cite any caselaw supporting
3 exclusion. Dkt. #35 at 1. Emotional distress from litigation conduct does not constitute
4 compensable damages caused by the tortfeasor and thus testimony to that effect is
5 irrelevant and unfairly prejudicial. FRE 401, 403. Defendant's motion is GRANTED to
6 the extent Plaintiffs claim that their emotional distress was due to the litigation or
7 Defendant's litigation conduct.
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- 9 2. Medical Causation Testimony From Lay Witnesses. Defendant moves to exclude
10 Plaintiffs and/or any other lay witness(es) to testify in an inherently speculative manner
11 regarding the assumed physical or mental condition of a third party or regarding de
12 facto medical causation. Dkt. #31 at 4. Defendant also seeks to exclude Plaintiffs'
13 family members or other lay witnesses to testify like an expert witness would regarding
14 Plaintiffs' "mental status" or psychological issues. *Id.* Defendant expects Plaintiffs to
15 attempt to introduce evidence that one or more of the Plaintiffs were "traumatized" or
16 "depressed," or "have anxiety." *Id.* Defendant argues these are "clinical diagnoses,"
17 and alleges that none of the Plaintiffs in this case have had any clinical mental health
18 evaluation or treatment of any kind related to the incident, nor any medical treatment at
19 all for that matter. *Id.* FRE 701(c) precludes lay witnesses from offering testimony
20 "based on scientific, technical, or other specialized knowledge within the scope of Rule
21 702." Lay witnesses may only provide opinion testimony as to what is "rationally
22 based on the witness's perception" and "helpful to clearly understanding the witness's
23 testimony or to determining a fact in issue." FRE 701 (a)(b). Plaintiffs argue that they
24 should be able to testify as to the symptoms of pain and suffering and that their family
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1 members and other lay witnesses should be allowed to testify as to their “sensory
2 perceptions.” Dkt. #37 at 2 (citing *Bitzan v. Parisi*, 88 Wash. 2d 116, 121, 558 P.2d
3 775, 778 (1977) (There is no reason laymen may not testify to their sensory perceptions,
4 the weight of the testimony to be determined by the trier of fact. Physical movement by
5 the injured person can be seen and described by a layman with no prior medical training
6 or skill... Furthermore, an injured person can testify to subjective symptoms of pain
7 and suffering, and to the limitations of his physical movements.) (citations omitted)).

8 Defendant’s motion is GRANTED IN PART to the extent that no lay witness may
9 declare Plaintiffs have a clinical diagnosis including “depression” or “anxiety.”
10 Plaintiffs may, however, testify as to their symptoms of pain and suffering of which
11 they have personal knowledge. Further, Plaintiffs’ family members and other lay
12 witnesses may testify as to their “sensory perceptions” based on personal knowledge.
13 This order does not bar Defendant from objecting to such testimony on other grounds.
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16 3. Irrelevant Procedural History/Supplemented Discovery Requests. Defendant seeks to
17 exclude *its own* response to Plaintiffs’ Interrogatory No. 5 in light of Plaintiff Joseph
18 Starling’s deposition testimony in which he seems to suggest Walmart never accused
19 his children of any criminal conduct or activity and he was not even aware this
20 allegation was in the complaint. *See* Dkt. #31-4. Defendant contends that its response
21 has no probative value because there were not any “accusations of theft in this case.”
22 Dkt. #31 at 6. However, Plaintiffs’ Complaint alleges Walmart accused the minor
23 plaintiffs of having committed theft. *See* Dkt. #1-3 ¶ 3.28. Whether Plaintiffs lied in
24 their complaint is a question for the jury and Defendant may provide testimony and
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1 evidence to refute or explain accusations that Defendant has “changed its story” as it
2 expects Plaintiffs to argue. *See* Dkt. #32 at 6. Defendant’s motion is DENIED.

- 3 4. Golden Rule/Reptile. Defendant seeks exclusion of any attempt to appeal to the passion
4 and prejudice of the jury (the prohibited “Golden Rule” argument). Dkt. #32 at 6.
5 Defendant also seeks to preclude Plaintiffs from any “reptile” tactics and lists certain
6 “buzzwords” and phrases it seeks to exclude. *Id.* at 7. Defendant’s motion is
7 GRANTED IN PART to the extent Plaintiffs may not make “Golden Rule” arguments
8 by asking jurors to place themselves in the shoes of a party. However, Defendant’s
9 motion to preclude “reptile” tactics is not a proper motion in limine; does not address
10 any specific evidence; is overly broad, undefined and ambiguous; and improperly
11 requests broad prior restraint on Plaintiffs’ trial strategy and presentation without
12 adequate justification. To the extent any evidence or argument refers to evidence that is
13 more prejudicial than probative, such can be addressed via objection at trial. Statements
14 made by counsel that are contrary to law can be addressed in closing arguments or
15 discussed when the Court prepares jury instructions.

- 16 5. Prohibit Race-Based Argument And/Or References. Defendant moves to exclude any
17 suggestion that Plaintiffs were treated differently because of their race and any “specific
18 reference, emphasis, commentary regarding the fact that Plaintiffs are African
19 American.” Dkt. #31 at 8. In response, Plaintiffs argue that their race is noted visually
20 and that references to race are relevant to their negligence claim against Walmart. Dkt.
21 #37 at 5. The Court finds that a blanket exclusion on any reference to Plaintiffs race is
22 overly broad. However, the Court GRANTS IN PART Defendant’s motion to the
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1 extent Plaintiffs may not make arguments that they were treated differently due to their
2 race as their discrimination claim did not survive summary judgment.

- 3 6. Prohibit Argument Concerning Manner & Means of Witness Presentation. Defendant
4 moves, pursuant to FRE 403, to exclude any suggestion that it engaged in malfeasance
5 related to the presentation of former Walmart employee Dera Utu at trial, or “withheld”
6 Utu—or make similar arguments. Dkt. #31 at 9. Defendant contends it provided
7 Plaintiffs with Utu’s last available contact information in compliance with its discovery
8 obligations and that Plaintiffs never attempted to contact Utu. *Id.* Plaintiffs argue they
9 did attempt to contact Utu to no avail, yet Defendant was “somehow able to locate Ms.
10 Utu after they lost on Summary Judgment.” Dkt. #3–4. The parties clearly have a
11 factual dispute that can be resolved by the jury. If Plaintiffs elicit any testimony
12 suggesting Defendant withheld Ms. Utu as a witness, Defendant is free to attack the
13 weight of such testimony on cross-examination. Defendant’s motion is DENIED.
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- 15 7. Prohibit Factually Inaccurate and Unfounded Assertions. Defendant moves to exclude
16 Plaintiffs’ testimony that they were accused of committing theft, that they felt they were
17 being accused of committing theft, and that Plaintiff Joseph Starling was sexually
18 assaulted. Dkt. #31 at 9–10. Defendant points to Plaintiff Joseph Starling’s deposition
19 transcript, which seems to suggest Walmart never accused his children of any criminal
20 conduct or activity and he was not even aware this allegation was in the complaint. *See*
21 Dkt. #31-4. Defendant’s arguments go to the weight and not the admissibility of such
22 testimony—it is for the jury, not the Court, to determine factual disputes. Defendant
23 is free to attack the weight of Plaintiffs’ testimony on cross-examination. Defendant’s
24 motion is DENIED.
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8. Exclude Walmart Policy AP-09 And Argument Related Thereto. Defendant moves, pursuant to FRE 403, to exclude Walmart Policy AP-09 which it claims it mistakenly produced in reliance on “fallacious claims from Plaintiffs that they were ‘accused of theft.’” Dkt. #31 at 10. Defendant argues that it is “undisputed” this case does not involve a shoplifting detention. Defendant points to Plaintiff Joseph Starling’s deposition transcript, which seems to suggest Walmart never accused his children of any criminal conduct or activity and he was not even aware this allegation was in the complaint. *See* Dkt. #31-4. The Court does not find that the policy alone would cause unfair prejudice, confusion, or mislead the jury and therefore DENIES Defendant’s motion on those grounds. However, the Court does question the relevance of AP-09 and does not bar Defendant from making FRE 401 or other objections if applicable during trial.

9. Exclude “Estimated” Medical Damages And Other Speculative Damages Claims. Defendant moves to exclude estimations of special damages or any claims for other damages or injuries related to assumed medical conditions or issues for lack of foundation. Defendant only discusses one specific example—that is Plaintiffs’ response to Walmart Interrogatory No. 14, in which they “estimated” \$1,000 in “medical damages” but have not produced any medical bills and allege Plaintiffs have not undergone any sort of medical treatment. Dkt. #31 at 11. Plaintiffs have not meaningfully responded to this motion. *See* Dkt. #37 ¶ 9. The Court reserves ruling on this issue until it comes up at trial and DEFERS Defendant’s motion.

B. Defendant’s Unopposed Motions in Limine

The Court GRANTS the parties’ agreed motions in limine as stated below:

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2 10. Expense of Litigation. Neither party will introduce evidence or argument regarding the
3 expenses of litigation incurred. This exclusion encompasses but is not limited to
4 speculation as to what the defense paid to defend Plaintiffs' lawsuit and/or costs to
5 Plaintiffs to pursue recovery. The parties will also not make reference to attorneys' fees
6 or discuss the possibility that Plaintiffs could have a judgment reduced pursuant to a
7 contingent fee agreement. Plaintiffs reserve the right to introduce such evidence or
8 argument should Defendant open the door.
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10 11. Size/Resources of Walmart. Neither party will introduce evidence or argument
11 regarding the size or resources believed to be available to Walmart and/or the law firm
12 representing Walmart, during voir dire or at any other time throughout the course of
13 trial. This prohibition encompasses comments on the number of lawyers working for
14 the law firm representing Walmart and bars any speculation or comment regarding the
15 perceived ability of Walmart and/or its insurers to pay a particular amount. Plaintiffs
16 reserve the right to introduce such evidence or argument should Defendant open the
17 door.
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20 12. Insurance Coverage. Neither party will introduce evidence or argument regarding
21 Walmart's insurance coverage and/or other means to satisfy a judgment. Plaintiffs
22 reserve the right to introduce such evidence or argument should Defendant open the
23 door.
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25 13. Taxability of Judgment. Neither party will introduce evidence or argument regarding
26 the taxability of any judgment or award. Plaintiffs reserve the right to introduce such
27 evidence or argument should Defendant open the door.
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- 1 14. Other Verdicts. Neither party will introduce evidence or argument regarding jury
2 verdicts in supposedly similar cases and/or the facts of supposedly similar cases.
- 3 15. Other Lawsuits. Neither party will introduce evidence or argument regarding other
4 lawsuits against Walmart, whether supposedly similar or not. Plaintiffs reserve the right
5 to introduce such evidence or argument should Defendant open the door.
- 6 16. Limit Treating Providers to Their Records. The parties will limit, or restrict, any
7 treating-provider-type experts to their records and any opinions stated therein. The
8 parties do not expect this will be an issue because neither party disclosed experts under
9 FRCP 26(a)(2), and because Plaintiffs did not undergo any medical treatment; however,
10 Walmart is making this motion out of an abundance of caution. The relief requested
11 herein is not intended to infringe either party's ability to use medical records for other
12 purposes, e.g. for impeachment.
- 13 17. References to Motions in Limine/Other Pre-Trial Motions. Neither party will introduce
14 evidence or argument regarding motions in limine and/or Walmart's Motion for
15 Summary Judgment, including arguments advanced and/or the outcome with respect to
16 particular motions/arguments.
- 17 18. Review Evidence. The parties will give one another the opportunity to review and
18 object to any and all exhibits, including illustrations and/or demonstrative exhibits,
19 before the parties or their counsel refer to those items in front of the jury
- 20 19. Witness Notice By End of Court Day. The parties will provide notice of the next day's
21 witnesses by the end of the court day. Should no such notice be provided, it would be
22 grounds to preclude the calling of that witness on the next day outside agreement of the
23 parties and the Court to the contrary.
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20. Exclude Non-Party Witnesses. Non-party witnesses will be excluded from the courtroom.

21. Uncalled Witnesses. The parties will not introduce evidence or argument regarding witnesses who appear on a witness list, that a party elects not to call for whatever reason. This motion is not intended to limit or infringe the right of the parties to argue that a party failed to meet its burden on a claim or defense, or that certain evidence is lacking, generally. This motion simply precludes seeking to ascribe meaning or attributing particular tactical intent to a decision of the other side not to call a witness.

II. PLAINTIFFS' MOTION IN LIMINE

A. Plaintiffs' Unopposed Motion in Limine

The Court GRANTS and GRANTS IN PART (as indicated) the parties' agreed motions in limine as stated below:

1. Exclude any Mention of Tax on Recovery. The parties agree not to make any reference to the tax implications of any jury award.
2. Prohibit Reference to Attorney's Fees, Employment Agreements, and Possible Recovery of Attorney's Fees. The parties agree not to make any reference to the award of attorney's fees in the event the claims and statute allow it. However, Defendant disagrees there is any statutory or other basis for an award attorneys fees in this case.
3. Prohibit Testimony/Comments on Witness Testimony Outside Closing Argument. The parties agree counsel will not introduce any testimony or comments on witness testimony outside closing argument.
4. Prohibit References to Motions in Limine. The parties agree not to comment or suggest Plaintiffs have excluded from proof any matter bearing on the issues in this case.

- 1 5. Exclude Non-Party Witnesses. The parties agree nonparty witnesses will be excluded
2 from the courtroom.
- 3 6. Preclude Claims That Jury Award Would Take Money From Walmart. Neither party
4 will suggest or imply that any award to the Plaintiffs will be at the expense of
5 Walmart's patrons.
- 6 7. Prohibit References to Lay Witnesses as "Experts". Plaintiffs' motion is GRANTED
7 IN PART. Neither party's counsel nor witnesses will refer to any witnesses as
8 "experts" unless found qualified as an expert under the relevant rules of evidence and
9 local rules.
- 10 8. Prohibit Demands for Requests Before the Jury. Neither party will make demands or
11 requests before the jury for matters found or contained in Plaintiffs' file, which would
12 include statements, pleadings, photographs or other documents, nor to demand or
13 request further or additional medical examinations, physical demonstrations or other
14 during requests during the course of the trial and in the presence of the jury. Further,
15 neither party will introduce any testimony or commentary that Plaintiffs may recover
16 attorneys' fees pursuant to 42 U.S.C. § 1983 should they prevail in this case.
- 17 9. Allow Family Photos and Photos of Starling Family. The parties agree that Plaintiffs
18 may introduce family photos and photos of the Starling family.
- 19 10. Preclude Implication That Walmart Has "No Prior Record of Misconduct." Plaintiffs'
20 motion is GRANTED IN PART. Defendant will not be permitted to suggest it has no
21 prior record of misconduct.
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1 11. Exclude Evidence Concerning Prior Good Acts of Walmart. The parties agree not to
2 introduce any evidence, testimony, mention or argument concerning any prior good acts
3 and/or endeavors by Walmart.

4 **B. Plaintiffs' Opposed Motions in Limine**

5 12. Prohibit Any Mention Of Any Drug And/Or Alcohol Abuse By Plaintiff Joseph
6 Starling. Plaintiffs seek to exclude any mention or reference that Plaintiff Joseph
7 Starling used or abused drugs and/or alcohol as irrelevant under FRE 401, prejudicial
8 and causing confusion under FRE 403. The Court cannot find any relevance that
9 Plaintiff Joseph Starling's drug and/or alcohol use prior to the incident on March 12,
10 2018, could have to any claims or defenses at issue in this case. The Court GRANTS
11 IN PART Plaintiffs' motion to the extent Defendant seeks to introduce any evidence
12 related to Plaintiff Joseph Starling's drug and/or alcohol use prior to March 12, 2018,
13 but reserves ruling the introduction of evidence related to Plaintiff Joseph Starling's
14 drug and/or alcohol use *on* the date of the incident.

15 13. Exclude All Evidence Of Plaintiff Joseph Starling's Prior Arrests And Criminal Record.
16 Plaintiffs move to exclude any evidence, testimony, or argument related to Plaintiff
17 Joseph Starling's unrelated prior arrests or prior criminal record. The Court finds
18 Plaintiff Joseph Starling's criminal record irrelevant to any claims or defenses at issue
19 in this case and GRANTS Plaintiffs' motion.

20 14. Exclude Evidence of Prior Bad Acts. Plaintiffs move to exclude any evidence,
21 testimony, mention or argument related to any "prior bad acts" by Plaintiff Joseph
22 Starling. The Court DENIES Plaintiffs' motion as it is overbroad and lacks specificity.
23 However, Defendant is reminded the Court has already ruled that Plaintiff Joseph
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Starling's prior arrests and criminal record are excluded under FRE 401. *See Section II.B.13.*

15. Exclude Undisclosed Witnesses and Evidence. Plaintiffs seek to exclude "any undisclosed witnesses and other undisclosed evidence." Plaintiffs have not identified any particular witnesses or evidence that Defendant intends to introduce into evidence. The Court will not operate in a vacuum. The Court DENIES Plaintiffs' motion. If Defendant attempts to introduce evidence or testimony that they did not previously disclose, Plaintiffs may renew their motion.
16. Allow "Conscience of the Community" Argument(s). Plaintiffs seek a prior approval from the Court to allow Plaintiffs to "ask the jury to consider what damages the plaintiff has suffered" and "ask the jury to place themselves in the position of [] compensating the plaintiff for the injuries the plaintiff sustained." Defendant argues Plaintiffs failed to confer regarding their intent to make this particular motion. Dkt. #36 at 5. LCR 7(d)(4) requires that "[i]f the court finds that counsel for any party, or a party proceeding pro se, willfully refuses to confer, fails to confer in good faith, or fails to respond on a timely basis to a request to confer, the court may take action as stated in LCR 11 of these rules." The Court DENIES Plaintiffs' motion.
17. Compel Witnesses to Appear in Civilian Clothing. Plaintiffs request the Court to require that all witnesses appear in civilian clothing without citation to rule, caselaw, or any other rationale. Plaintiffs' motion is DENIED.
18. Exclude Evidence Regarding Unrelated Medical Conditions. Plaintiffs move to exclude evidence, testimony, or argument regarding unrelated medical conditions. The Court DENIES Plaintiffs' motion as it is overbroad and lacks specificity.

III. CONCLUSION

Having reviewed the relevant briefing and the remainder of the record, the Court hereby finds and ORDERS that the above Motions in Limine (Dkts. #31, 32) are GRANTED, GRANTED IN PART, DENIED, AND DEFERRED as stated above.

DATED this 16th day of February, 2023.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE